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No. 488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

ELLEN D. BAY, ET AL., *Petitioners*

v.

JOHN W. MECOM, TRUSTEE, ET AL., *Respondents*

PETITION FOR WRITS OF CERTIORARI To The Supreme Court Of The State Of Texas: The Beaumont, Texas Court Of Civil Appeals: The Eastland, Texas Court Of Civil Appeals: And The District Court Of Liberty County, Texas

RESPONDENTS' BRIEF IN OPPOSITION

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To The Honorable Supreme Court Of The United States:

On motion for summary judgment, the District Court of Liberty County, Texas, held, on the undisputed facts of record, and as an application of Texas law hereto, that Respondents had created a valid pool for oil and gas on

land located in Liberty County, State of Texas. This Trial Court judgment was affirmed by the Eleventh Court of Civil Appeals of Texas and by the Supreme Court of Texas refusing writ of error, no reversible error.

In opposition to the grant of petition for writ of certiorari, Respondents say:

I

NO FEDERAL QUESTION IS PRESENTED BY THE PETITION

There was involved below nothing but application of Texas property and contract law to undisputed facts. The Respondents exercised a contractual pooling power in an oil and gas lease at which time all pooling in Texas was a matter of contract and governed only by a requirement of good faith in the exercise of the pooling power. (Vol. 5, LANGE'S TEX. PRAC., Sec. 841; *Humble Oil & Ref. Co. v. Carr*, 243 S.W.2d 709 Tex. Civ. App., Writ of error refused. No reversible error; *Tiller v. Fields*, 301 S.W.2d 185 Tex. Civ. App. No writ history). The Petitioners admitted the exercise of the pooling power was in good faith, and the Trial Court granted Respondents' motions for summary judgment. The Petitioners' only contention in the Courts of Texas has been that the pool was invalid based on the erroneous conclusion that the Railroad Commission of Texas had to ratify and approve the pool. If there is any law well settled within the State of Texas, it is to the effect that the Railroad Commission of Texas could not effect property rights and could not prohibit nor compel pooling. (Vol. 5, LANGE'S TEX. PRAC. Sec. 841; *Humble Oil & Ref. Co. v. Carr*, 243 S.W.2d 709 Tex. Civ. App., error ref'd, n.r.e.;

Dailey v. Railroad Comm., 133 S.W.2d 219 Tex. Civ. App. error ref'd; *Novak v. Bruner*, 320 S.W.2d 439, Tex. Civ. App. error ref'd).

This area of law is peculiarly an area of State cognizance. (*Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 1938). We respectfully submit that the issues have been settled in this case on its own facts, under Texas law, and by those Courts which have complete authority thus to decide. (*Erie Railroad Co. v. Tompkins*, supra; *Murdock v. City of Memphis*, 20 Wall. 590, 1874; *Black v. Cutter Laboratories*, 351 U.S. 292, 1956).

II

NO FEDERAL QUESTION WAS RAISED IN THE STATE COURTS

In the absence of Federal constitutional issues being raised and determined below, no Federal question can be entertained here. (*Walters v. City of St. Louis*, 347 U.S. 231, 233, 1954; *Newsom v. Smith*, 365 U.S. 604, 1961; *Michel v. Louisiana*, 350 U.S. 91, 1955; *Pennsylvania Railroad Co. v. Illinois Brick Co.*, 297 U.S. 447, 1936). Petitioners' most optimistic statement as to the raising of Federal questions alleges that such questions were presented in Petitioners' Motion for Rehearing in the Supreme Court of Texas. It is settled that it is too late to raise a Federal question for the first time in a Petition for Rehearing in the highest State Court. (*Waters-Pierce Oil Co. v. Texas*, Tex. 1909, 29 S.Ct. 227, 212 U.S. 112, 53 L.Ed. 431; *McMillen v. Ferrum Min. Co.*, Colo. 1905, 25 S.Ct. 533, 197 U.S. 343, 49 L.Ed. 784; *Susquehanna Boom Co. v. West Branch Boom Co.*, Pa. 1884, 3 S.Ct. 438, 110 U.S. 57, 28 L.Ed. 69).

III

PETITIONERS' PETITION FOR WRIT OF CERTIORARI IS NOT TIMELY FILED

The Petition for writ of certiorari affirmatively shows that motions for rehearing on two of the opinions complained of were overruled, one on February 17, 1965, and the other on October 6, 1965. A petition for writ of certiorari from those judgments is not proper as not filed within ninety (90) days.

Respondents submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this Brief in Opposition was served upon counsel of record for Petitioners, Overton B. Banks, 466 San Jacinto Bldg., Houston, Texas, 77002, and Joseph W. Cash, 600 San Jacinto Building, Houston, Texas, 77002, by depositing the same in the United States mail with air mail postage thereon, properly addressed, in compliance with Rule 33(1) of the Revised Rules of the Supreme Court of the United States.

G. KIBBY MUNSON